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No.

# In the
# SUPREME COURT OF THE UNITED STATES

October Term, 1999

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DARRIN L. SHORT, *Petitioner,*

*v.*

UNITED STATES OF AMERICA, *Respondent.*

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Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Was Petitioner denied his right to constitutional and military due process in a case where the only evidence of guilt was the result of a scientific test and where he was forced to rely upon the prosecution's sole expert witness for assistance, when that expert did not constitute "competent" expert assistance as required by *Ake v. Oklahoma*, 470 U.S. 68 (1985), and 10 U.S.C. § 846 (1994) due to his clear conflict of interest and resulting lack of independence?

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## PETITION FOR A WRIT OF CERTIORARI

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Aviation Structural Mechanic (Hydraulics) Second Class Darrin L. Short, U.S. Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, reported at 50 M.J. 370 (1999), is located at Appendix A (1a-23a). The unreported opinion of the Navy-Marine Corps Court of Criminal Appeals, No. 95 1617 (N.M. Ct. Crim. App. November 10, 1997) (unpub. op.), is located at Appendix B (24a-28a).

## JURISDICTION

The United States Court of Appeals for the Armed Forces entered its judgment on May 26, 1999. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Article 36, Uniform Code of Military Justice, 10 U.S.C. §836, provides in part:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Article 46, Uniform Code of Military Justice, 10 U.S.C. §846, provides in part:

> "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

## STATEMENT

On March 23, 1995, Petitioner's commanding officer ordered him to provide a urine sample, which was sent to the Naval Drug Screening Lab in Jacksonville, Florida for testing. (R. at 171-72.) The sample ultimately tested positive for tetrahydrocannanibol [THC], a purported metabolite produced by the ingestion of marijuana. (R. at 243.) Petitioner subsequently was charged with unlawful use of a controlled substance, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a, based solely on the urinalysis test result.

At his court-martial, Petitioner filed a timely motion requesting independent expert assistance. (R. at 20; Appellate Exhibit-IV.) Citing her insufficient background in the area of scientific urinalysis testing procedures, as well as, the complexity of the scientific information involved in the case, defense counsel requested an independent expert to assist her in understanding the scientific evidence, identifying deficiencies with that evidence, and preparing effective cross-examination of the prosecution's expert witness. (R. at 21; Appellate Exhibit-IV.) After conceding that the defense was entitled to expert assistance, the government opposed the motion, claiming that the prosecution's urinalysis expert from the Jacksonville drug lab, Mr. Cary Hall, would serve as an "adequate substitute" for the independent expert

requested by Petitioner. (R. at 22-23.) Defense counsel contested this claim. She asserted that the absence of confidentiality in any consultations she would have with Mr. Hall, as well as his obvious affiliation with both the prosecution and the lab that tested Petitioner's sample, rendered any assistance he could offer the defense inadequate. (Appellate Exhibit-IV.) Since the Jacksonville lab had a policy prohibiting its employees from testifying against each other at courts-martial, defense counsel indicated that an expert from one of the other military drug-testing laboratories would be sufficient. *Id.* The military judge denied Petitioner's motion. (R. at 25.) The military judge found that Mr. Hall, who ultimately testified against Petitioner, was a neutral witness who represented neither side and, therefore, could provide the defense with adequate assistance. *Id.* He further advised defense counsel to consult with other military defense attorneys in order to acquire the desired technical knowledge. *Id.*

Prior to his trial, Petitioner filed an extraordinary writ appealing the military judge's ruling with the Navy-Marine Corps Court of Criminal Appeals. (Appellate Exhibit-XIX.) The writ was denied. After Petitioner was convicted of wrongfully using marijuana based on the urinalysis test result alone, the Navy-Marine Corps Court of Criminal Appeals ultimately affirmed the conviction and sentence. *United States v. Short*, No. 95 1617 (N.M. Ct. Crim. App. November 10, 1997).

The Court of Appeals for the Armed Forces affirmed the Court of Criminal Appeals' decision on May 26, 1999, and upheld the military judge's ruling. *United States v. Short*, 50 M.J. 370 (1999). The Court of Appeals for the Armed Forces held that the military judge did not abuse his discretion in denying the motion because the defense counsel did not show the requisite "necessity" for the independent expert.

## REASON FOR GRANTING THE PETITION

**Petitioner was denied his right to constitutional and military due process in a case where the only evidence of guilt was the result of a scientific test and where he was forced to rely upon the prosecution's sole expert witness for assistance because that expert did not constitute "competent" expert assistance as required by *Ake v. Oklahoma*, 470 U.S. 68 (1985), and 10 U.S.C. § 846 (1994) due to his clear conflict of interest and resulting lack of independence.**

A. The right to expert assistance in the military.

A military servicemember's right to expert assistance at court-martial has three sources: 1) the Due Process Clause of the Constitution, as interpreted in *Ake v. Oklahoma,* 470 U.S. 68 (1985), 2) Article 46, Uniform Code of Military Justice, 10 U.S.C. § 846 [hereinafter U.C.M.J.], and 3) Rule for Courts-Martial [hereinafter R.C.M.] 703(d), Manual for Courts-Martial [hereinafter MCM], United States (1998 ed.). In *Ake v. Oklahoma* this Court held that when an indigent defendant demonstrates that his sanity at the time of the offense will be a significant factor at trial, the government must assure the defendant access to an independent, competent psychiatrist who will assist in the evaluation, preparation, and presentation of the defense. *Ake*, 470 U.S. at 83.[1]

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[1] *Ake* represented an expansion of earlier due process cases holding that an indigent defendant is entitled to the minimum assistance necessary to assure him "a fair opportunity to present his defense" and "to participate meaningfully in the judicial process." *Medina v. California*,

Consistent with *Ake*, the Court of Appeals for the Armed Forces has ruled more broadly that, "[a]s a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigency." *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986).[2] This does not mean, however, that an accused is entitled to an expert of his own choosing. *United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 1990). "All that is required is that **competent** assistance be made available." *Id.* (citing *Ake*, 470 U.S. at 83) (emphasis added). A demonstrated willingness to provide competent assistance at government expense satisfies the government's burden. *Id.* at 476.

In addition to this due process right, Congress requires that the prosecution and the defense counsel must have "equal opportunity to obtain witnesses" in accordance with the regulations prescribed by the President. Article

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505 U.S. 437, 444 (1992) (quoting *Ake*, 470 U.S. at 76).

[2] This holding parallels the broader Congressional mandate in the Criminal Justice Act of 1964 making "investigative, expert, or other services necessary to an adequate defense" available to indigent defendants. 18 U.S.C. § 3006A(e). *Garries* was the initial case holding *Ake* applicable to military servicemembers. Consequently, subsequent military decisions often cite to *Garries* in lieu of *Ake* for the principle that an accused must first demonstrate necessity before the government is required to supply competent expert assistance to aid in his defense. Numerous other jurisdictions also have expanded the principles of *Ake* beyond psychiatric assistance to DNA experts, fingerprint experts, intoxication experts, hypnosis experts, and dental experts, where such specialized evidence played a significant role at trial. *Little v. Armontrout*, 835 F.2d 1240 ( 8th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988); *Dubose v. State*, 662 So.2d 1189, 1193-94 (Ala. 1995); *Polk v. State*, 612 So.2d 381 (Miss. 1992); *State v. Bridges*, 385 S.E.2d 337 (N.C. 1989); *State v. Moore*, 364 S.E. 648 (N.C. 1988); *State v.Coker*, 412 N.W.2d 589 (Iowa 1987); *Thornton v. State*, 339 S.E.2d 240 (Ga. 1986).

46, U.C.M.J., 10 U.S.C. § 846. The President merely requires an accused requesting the testimony of an expert to submit the request first to the convening authority[3], and if that request is denied, to renew the request before the military judge. R.C.M. 703(d). The military judge then shall determine "whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute." *Id.* These two military provisions mirror this Court's holdings that, as a matter of fundamental due process, an indigent defendant must be provided "the basic tools of an adequate defense."[4] *United States v. Van Horn*, 26 M.J. 434, 437 (C.M.A. 1988) (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

Until the present case, the Court of Appeals for the Armed Forces [hereinafter Court of Appeals] consistently has applied the *Ake* principles to the military justice system in accordance with Article 46 and R.C.M. 703(d). In *Ake*, this Court emphasized the importance of dueling experts in enabling the jury to "make its most accurate determination of the truth on the issue before them." *Ake*, 470 U.S. at

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[3] The convening authority is the officer with the power to create a court-martial and order the accused to trial before that court-martial. Depending upon his rank, that officer may be the commanding officer of the accused or a general officer in command. *See* R.C.M. 504.

[4] "The administration of military justice is rooted in inherent fair play and justice that prevail under the Anglo-American system of law." *United States v. Manuel*, 43 M.J. 282, 286 (1995). In defining the rights of servicemembers under the U.C.M.J., Congress is not limited to the minimum requirements established by the Constitution and, in many instances, has provided protections stronger than those found in the civilian sector. *Id.* In promulgating the Manual for Courts-Martial, the President can go even further than the Constitution and the U.C.M.J. in providing protections for military personnel. *Id.* Article 46 and R.C.M. 703(d), as interpreted by the Court of Appeals for the Armed Forces, are examples of such protections.

81. This Court expressed concern that, without such expert assistance to aid the defense in, *inter alia*, preparing the cross-examination of the government's expert witness, "the risk of an inaccurate resolution" of the central issue in the case increases. *Id.* at 82. In Petitioner's case, however, the Court of Appeals abandoned its adherence to these principles and ignored its own previous rulings interpreting Article 46 and R.C.M. 703(d) as concordant with *Ake*.

B. The necessity of "dueling" experts in drug urinalysis prosecutions.

When scientific evidence of urinalysis testing alone is relied upon to prove drug use, the government may not presume that the judge or courts-martial members[5] are experts capable of interpreting such evidence.[6] *United States v. Murphy*, 23 M.J. 310, 312 (C.M.A. 1987). As a result, in a military prosecution for drug use based solely on urinalysis results, the government **must** present expert testimony to assist the judge or members in interpreting the scientific data. *Id.*; *see generally United States v. Campbell*, 50 M.J. 154 (1999) (discussing the complex scientific analysis involved in urinalysis-based drug prosecutions). In *United States v. Van Horn*, a drug use prosecution based solely on urinalysis results, the Court of Appeals relied on the "equal opportunity" clause of Article 46, U.C.M.J. to rule that denying the defense a "meaningful opportunity" to present evidence challenging the government's scientific proof, its reliability, and its

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[5] Members are the military equivalent of jurors in civilian trials.

[6] Scientific principles of urinalysis testing do not qualify as matters of "common sense" or "knowledge of human nature," both of which can properly be used by the trier of fact in considering "the inherent probability or improbability of the evidence." *Murphy*, 23 M.J. at 311; R.C.M. 918(c).

interpretation, deprives an accused of a fair trial. *Van Horn*, 26 M.J. at 436-38 (citing *Murphy*, 23 M.J. at 312). In his concurrence in *Van Horn*, then-Chief Judge Everett explained, "[i]n light of the considerable latitude which this Court has heretofore granted to the Government in its urinalysis program, it is only fair that servicemembers accused of using drugs be given meaningful access to experts who are willing to challenge testing procedures and results." *Van Horn*, 26 U.S. at 439 (Everett, C.J., concurring).[7] Accordingly, in *United States v. Burnette*, also a drug use prosecution relying on urinalysis test results, the Court of Appeals stated that "very little, if any, showing of necessity [is] required to entitle the defense to expert assistance in the interpretation of drug analyses." *Burnette*, 29 M.J. at 475.

More importantly, the lower court ruled in *Burnette* that the prosecution's expert witness does not constitute an "adequate substitute" for an expert requested by the defense under R.C.M. 703. *Id.* at 476. Because the military

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[7] The "considerable latitude" afforded the military in drug use prosecutions includes the abilities to compel servicemembers to produce urine samples for testing and to rely on a test result alone to convict a servicemember of wrongful use "when there is no other evidence of criminality, including no evidence of an observable reaction to the substance." *Campbell*, 50 M.J. at 160. Thus, Petitioner respectfully requests that this Court consider the same principle of fundamental fairness to which then-Chief Judge Everett was referring in light of *United States v. Scheffer*, 523 U.S. 303 (1998) (holding that, even in a drug prosecution relying solely on urinalysis test results, the exclusion of exculpatory polygraph results under Military Rule of Evidence 707 does not violate accused servicemember's constitutional right to present a defense). If the instant decision were to stand, when combined with the inability to admit exculpatory polygraph results upheld by *Scheffer*, servicemembers who do not have specific "innocent ingestion" defenses would be completely unable to defend themselves against urinalysis-based drug charges. As a result, an already harrowing burden on these servicemembers would become insurmountable.

accused, unlike the civilian defendant, has the resources of the government at his disposal, "in the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial." *Garries*, 22 M.J. at 290-91. However, an expert who, in fact, is "presenting incriminating evidence against [the accused] on behalf of the prosecution" is not an "adequate substitute" for such independent assistance because "it would hardly be fair to expect the defense to extract its ammunition from one of the very witnesses whose conclusions it was attacking." *Burnette*, 29 M.J. at 476 (citing *Van Horn*, 26 M.J. 434). When requested, the government must provide the defense with an independent expert who is not connected to the challenged laboratory. *Van Horn*, 26 M.J. at 437.

According to *Van Horn* and *Burnette*, in order to satisfy the competency requirement under *Ake* and *Garries*, an expert must be sufficiently independent from the prosecution to ensure conflict-free assistance to the defense. *See United States v. Short*, 50 M.J. 370, 377 (1999) (Sullivan, J., dissenting). The Ninth and Tenth Circuits also have interpreted the competency requirements of *Ake* in this manner in holding that, for purposes of confidentiality, a defense expert must be neither "neutral" nor associated with the prosecution in order to satisfy due process. *See Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990); *United States v. Crews*, 781 F.2d 826 (10th Cir. 1986).[8] Furthermore, prior to *Ake*, the D.C. Circuit similarly interpreted 18 U.S.C. § 3006A(e)—the equivalent

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[8] *See also Harris v. Vasquez*, 949 F.2d 1497, 1517 (9th Cir. 1990) (explaining that the confidentiality and independence issues involved in *Smith* were significant to that decision); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (state's duty to an indigent defendant "cannot be satisfied with the appointment of an expert who ultimately testifies contrary to the defense").

of the *Garries* ruling—as requiring an "independent" expert to aid the defense, because "[t]wo, three, or four psychiatrists for the Government and the court do not constitute adequate expert assistance for the defense." *United States v. Chavis*, 486 F.2d 1290, 1292 (D.C. Cir. 1973).[9]

The rulings of the 9th, 10th, and D.C. Circuits, as well as the lower court's interpretations of Article 46 and R.C.M. 703(d) under *Ake*, are clear. When expert testimony is germane to a "significant issue" at trial and a request for an independent expert is made, any expert assistance provided to the defense by the government must be independent in order to be truly "competent." This aspect of competency—that the expert be neither neutral nor affiliated with the prosecution—is essential to meeting the due process requirements of *Ake*. *See Kordenbrock v. Scroggy*, 919 F.2d 1091, 1122-23 (6th Cir. 1990) (Martin, J., concurring in part and dissenting in part) ("It is clear that the *Ake* majority did not contemplate a neutral psychiatrist as satisfying due process.")[10] Because the government did not meet its burden of offering competent expert assistance to the defense in this case, Petitioner was clearly denied due process. *See Burnette*, 29 M.J. at 476.

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[9] *See also United States v. Bass*, 477 F.2d 723 (9th Cir. 1973) (prosecutor should have no influence in selection of defense expert); *Marshall v. United States*, 423 F.2d 1315, 1319 (10th Cir. 1970) (expert who shares "a duty to the accused and a duty to the public interest" is burdened by "an inescapable conflict of interest").

[10] "Indeed, Justice Rehnquist assailed the majority in his dissenting opinion [in *Ake*] for establishing the right to a 'defense consultant'." *Kordenbrock*, 919 F.2d at 1123 (Martin, J., concurring in part and dissenting in part) (citing *Ake*, 470 U.S. at 87). "Moreover, in *Ake*, the Court all but overruled *United States ex rel Smith v. Baldi*, 344 U.S. 561[ ] (1953), where the state had supplied neutral psychiatrists." *Id.*

C. Denial of competent expert assistance by the military judge.

Petitioner satisfied every existing requirement of the law in an attempt to obtain independent expert assistance to aid in his defense. Petitioner exhausted every available remedy by submitting a request for expert assistance first to the convening authority,[11] and then to the military judge, as required by R.C.M. 703(d). *United States v. Short*, 50 M.J. 370, 371 (1999). Consistent with both *Burnette* and *Van Horn*, Petitioner requested "the opportunity to have somebody, who is not employed by the drug lab, assess the chain of custody and procedures which were used by the drug lab." *Id.*[12]

The prosecutor, in fact, conceded that petitioner was entitled to expert assistance. *Id.* at 372. However, contrary to the requirements of *Burnette* and *Van Horn*, the prosecutor would not acknowledge that Petitioner was entitled to an independent expert, unaffiliated with the Jacksonville lab. By offering defense counsel the assistance of Mr. Hall, the military judge also conceded that the defense was in need of expert assistance. *See id.* at 374 (Sullivan, J., dissenting). However, the military judge erroneously ruled that, since Mr. Hall was available to consult with defense counsel, petitioner had failed to meet his burden of showing "necessity" and denied the motion. *Short*, 50 M.J. at 372.[13]

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[11] The prosecution recommended that the convening authority deny the request, claiming that "a suitable substitute" was available from the Naval Drug Screening Lab in Jacksonville. *Short*, 50 M.J. at 371.

[12] Defense counsel argued that "[i]t is unlikely that an employee of the drug lab is going to point out deficiencies or problems in the procedures used." *Short*, 50 M.J. at 371.

[13] The military judge erroneously found that the prosecution's principal witness would "not be here to represent either party" and would be "equally available to both the Government and defense . . . without

By contradicting the law under *Burnette* and *Van Horn*, the military judge's ruling failed to comply with the "equal opportunity" requirement of Article 46 and the "adequate substitute" requirement of R.C.M. 703(d), as well as violating the constitutional due process requirements of *Ake*. Nevertheless, the Court of Appeals for the Armed Forces upheld the military judge's ruling. Ignoring its prior rulings in *Van Horn* and *Burnette*, the Court of Appeals incorrectly held that the military judge did not abuse his discretion by denying the request for independent expert assistance because Petitioner failed to show "necessity." *Id.* at 373.[14]

The Court of Appeals majority further erred in revisiting the issue of "necessity," which had been conceded on the record by the government.[15] *Short*, 50 M.J. at 377 (Sullivan, J., dissenting); *id.* at 378 (Effron, J., dissenting). Since the military judge did not expressly reject

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shading his testimony to favor either side in this case." *Short*, 50 M.J. at 376 (Sullivan,J., dissenting).

[14] In a highly convoluted and circular decision, the Court of Appeals majority confused a request for non-military expert assistance, the basis for the *Garries* ruling, with Petitioner's request for any expert assistance not affiliated with the Jacksonville drug lab where Petitioner's sample was tested. *See Short*, 50 M.J. at 373; *Garries*, 22 M.J. at 290-91. Significantly, unlike the accused in *Garries*, Petitioner did not reject assistance from all government experts. *Short*, 50 M.J. 370, 377 (Sullivan, J., dissenting). The defense only rejected assistance from a particular government expert, Mr. Hall, who was both testifying for the prosecution against Appellant and employed by the Jacksonville lab. *Id.* The majority also confused petitioner's initial request for a specific, named, civilian expert witness with his ultimate request for expert assistance from any expert independent of the Jacksonville lab to assist in defense preparation. *See Short*, 50 M.J. at 373.

[15] The prosecution affirmatively conceded that issue when the prosecutor stated that, "the Government does not contest in any way, shape or form that the accused is entitled to expert assistance." *Short*, 50 M.J. at 378 (Effron, J., dissenting).

that concession, the lower court was obligated to accept it "for the same reason that any trial waiver is accepted on appeal—the concession relieved the defense from any burden." *Short*, 50 M.J. at 378 (Effron, J., dissenting) (citing S. Childress and M. Davis, 1 *Federal Standards of Review* § 6.03 at 6-28 to 6-29 (2d ed. 1992)). The scope of the lower court's review in this case was substantially limited by the government's concession that Petitioner was entitled to government-funded expert assistance. *Id.* at 376 (Sullivan, J., dissenting).[16] In this respect, the Court of Appeals majority exceeded its authority in revisiting the question of "necessity" in this case.[17] Thus, the only question this Court must review in this case is whether the prosecution's sole and essential expert witness constituted "competent" expert assistance under *Ake v. Oklahoma* in light of his clear conflict of interest and resulting lack of independence.

D. Why this decision cannot stand.

The United States military has prosecuted thousands of servicemembers for drug use based solely on positive drug urinalysis results.[18] Relying solely on the same

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[16] "A party who voluntarily . . . takes a position which is inconsistent with the right to appeal therefrom, thereby impliedly waives . . . his right to have such judgement . . . reviewed by an appellate court." *Short*, 50 M.J. at 376 (Sullivan, J., dissenting) (citing 4 C.J.S. Appeal and Error § 185 at 255 (1993)).

[17] Petitioner's assertion that the lower court exceeded its jurisdiction under Article 67(c), U.C.M.J., is another reason for this Court to grant review in this case. *See Clinton v. Goldsmith*, 119 U.S. 1538 (1999).

[18] In fiscal year 1998 alone, the Defense Manpower Data Center reported that 14,175 servicemembers tested positive for illegal drug use in urinalysis tests. Since FY93, the Navy alone has averaged 7,208 positive test results per year. Courts-martial based on these positive test results began in 1982. Those convicted at general or special courts-

complex scientific evidence, thousands more will be prosecuted in the future.[19] Like the psychiatric testimony in *Ake*, the evidence presented by the prosecution experts in these cases is essential to prove the central issue in dispute: whether the accused, in fact, knowingly and wrongfully used drugs. Unlike typical criminal prosecutions, no witness to the crime testifies that the accused used drugs in urinalysis cases. The only witnesses presented by the prosecution are the "observer" who watched the accused give his sample, the "urinalysis coordinator" who testifies regarding the chain of custody at the command, and, most importantly, the "drug lab expert" who assists the

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martial will carry federal criminal convictions, with all of the collateral consequences of those convictions, for the rest of their lives. The maximum punishment a servicemember may receive for a single conviction of marijuana use is a dishonorable discharge, forfeiture of all pay and allowances, and two years confinement. Convictions for use of other Schedule I, II, or III controlled substances carry a maximum sentence of five years confinement. MCM (1998 ed.), Part IV, ¶37 (e)(1).

[19] This Court has never directly ruled on the constitutionality of these prosecutions. While theoretically the burden remains on the government to prove the elements of knowing and wrongful use, once the positive results of the urinalysis tests are admitted a "permissive inference" of wrongfulness can be made by the jury members in order to convict the servicemember. MCM (1998 ed.) Part IV, ¶37 (c)(5). Thus, as a practical matter, once the urinalysis results are admitted into evidence, the burden shifts to the accused to show that either a) the test results are unreliable/inaccurate or 2) he/she somehow "innocently ingested" the drug. The government's reliance on a permissive inference and the resulting burden shift accentuate the critical importance of an accused's access to independent experts who can assist with challenging the lab results, identifying potential deficiencies in testing procedures, and cross-examining the government's expert witness from the lab. Without access to this sort of assistance—the same assistance the government is required to use under *Murphy*—an accused who does not have a specific "innocent ingestion" defense would be stripped of any ability to present a defense.

government in explaining the scientific testing procedures used in the lab. As in *Ake*, the reliability of the drug testing procedures and the accuracy of the lab results are generally the most "significant factor[s] at trial." *See Ake*, 470 U.S. at 83.[20] Therefore, the independent, confidential expert sought by Petitioner in this case was consistent with the due process requirement of "competency" mandated by this Court in *Ake* and applied to the military in *Garries*.

The Court of Appeals' decision in Petitioner's case will provide military judges in drug urinalysis prosecutions with a legal basis for denying independent, conflict-free expert assistance to all servicemembers accused of drug use based on urinalysis results. This denial of "meaningful access to experts who are willing to challenge [the] testing procedures and results" would deprive every servicemember prosecuted for these offenses of a fair trial. *Van Horn*, 26 M.J. at 439 (Everett, C.J., concurring). Forcing these servicemembers to rely on the prosecution's sole expert witness for assistance in challenging the government's scientific proof—which that very witness is presenting on behalf of the government—clearly constitutes the type of due process violation feared in *Ake*.[21] The

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[20] Due to the heightened significance of the complex scientific evidence in these cases, the role of "dueling" experts in enabling the jury to "make its most accurate determination of the truth on the issue before them"—whether the accused knowingly and wrongfully used drugs—acquires even more importance. *See Ake*, 470 U.S. at 81. Without such independent expert assistance to aid the defense in effectively preparing for trial and cross-examining the prosecution expert, "the risk of an inaccurate resolution" of the central issue increases in the government's favor. *See id.* at 82.

[21] *See United States v. Sebring*, 44 M.J. 805 (N.M. Ct. Crim. App. 1996) (where government expert from the Norfolk drug lab testified that lab's testing procedures were reliable while withholding information regarding an investigation of that lab which found that employees had falsified lab results, illustrating that a drug expert

unique legal bases of these prosecutions, however, makes the constitutional deprivation even more dangerous.

No military defense attorney should be required to acquire the type of complex scientific knowledge in order to effectively defend her client that the Court of Appeals has concluded the prosecutor, military judge, or members cannot be expected to learn. *See Murphy*, 23 M.J. at 310, 312. The result of this case clearly violates the "equal opportunity" clause of Article 46, U.C.M.J., as well as, the "adequate substitute" requirement of R.C.M. 703(d). Under Article 36, U.C.M.J., 10 U.S.C. § 836, the "adequate substitute" requirement of R.C.M. 703(d) should be interpreted in a manner consistent with the holdings of the 9th, 10th, and D.C. Circuits. As it stands, this decision is in direct conflict with the law in those circuits, as well as the law of this Court in *Ake*.

The Court of Appeals' erroneous ruling in this case now could be applied to requests for expert assistance in other prosecutions for more serious offenses. Military judges now may use this ruling to force the defense to "share" the prosecution expert witness in child molestation cases, murder cases, rape cases, and the like. The forced sharing of these types of psychiatric/psychological or DNA experts would clearly violate due process under *Ake*. Since this type of due process violation is not being tolerated by the various circuit courts, and presumably would not be tolerated by this Court in interpreting 18 U.S.C. § 3006A(e), it should not be tolerated in the military either. Allowing this decision to stand would severely jeopardize every servicemember's right to a fair trial in any court-martial where expert testimony is presented by the government.

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employed by the testing lab is not as neutral and detached as the military judge's findings in Petitioner's case would imply).

## CONCLUSION

The military judge clearly erred in finding that, since the prosecution's expert witness was available to assist the defense, Petitioner had not demonstrated "necessity" for an independent expert. As a result of this error, Petitioner was denied his rights to constitutional and military due process at his court-martial. The lower court's decision upholding this ruling stands to endanger the due process rights of all servicemembers tried at courts-martial where expert testimony is presented by the government. This Court must not allow this decision to stand. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1999

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

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No. 98-0265

Crim.App. No. 95 1617

United States, *Appellee*

*v.*

Darrin L. SHORT, Aviation Structural Mechanic
(Hydraulics) Second Class
U.S. Navy, *Appellant*

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Argued Nov. 17, 1998

Decided May 26, 1999

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For Appellant: *Lieutenant Commander L. J. Lofton*, JAGC, USN (argued); and *Lieutenant Commander R.C. Klant*, JAGC, USN, *Lieutenant Commander Rebecca Gilchrist*, JAGC, USN, and *Lieutenant Syed N. Ahmad*, JAGC, USNR (on brief).

For Appellee: *Major Clark R. Fleming*, USMC (argued); *Commander D.H. Myers*, JAGC, USN (on brief); *Colonel Charles Wm. Dorman*, USMC, and *Major Clark R. Fleming*, USMC. *Opinion of the Court*

GIERKE, Judge:

A special court-martial composed of officer members convicted appellant, contrary to his pleas, of one specification of wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The adjudged and approved sentence provides for a bad-conduct discharge and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion.

This Court granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S REQUEST FOR A GOVERNMENT URINALYSIS EXPERT TO ASSIST IN HIS DEFENSE.

We hold that the military judge did not abuse his discretion, for the reasons set out below.

*Factual Background*

The charges against appellant were based on a positive urinalysis, in which appellant's sample contained 16 nanograms per milliliter of the metabolite of marijuana, 1 nanogram over the Department of Defense cutoff for reporting samples as positive. Before trial, defense counsel submitted a request to the convening authority for the production of Dr. William Manders, a forensic toxicologist, to testify concerning passive inhalation and innocent ingestion. Trial counsel recommended that the request be denied, on the ground that a suitable substitute was available from the Naval Drug Screening Laboratory, Jacksonville, Florida.

When the court-martial convened, the convening authority had not yet acted on the request. Defense counsel renewed her request at an Article 39(a)1 session before the military judge. The parties stipulated that Dr. Manders would testify that "both innocent ingestion and passive inhalation could lead to the positive test for THC, the metabolite found in marijuana, based on the levels found in the sample submitted by Petty Officer Short."

Defense counsel asserted at trial that the government witnesses would not testify that passive inhalation could produce marijuana metabolites at the level of 16 nanograms per milliter. Trial counsel disputed her assertion and argued that the Government was able to produce an adequate substitute for Dr. Manders.

As the Article 39(a) session progressed, defense counsel broadened the scope of her request for assistance. She requested "the opportunity to have somebody, who is not employed by the drug lab, assess the chain of custody and procedures which were used by the drug lab." She argued that "[i]t is unlikely that an employee of the drug lab is going to point out deficiencies or problems in the procedures used." The military judge denied the motion to compel production of Dr. Manders as not ripe for resolution, since the convening authority had not yet acted. The court-martial then recessed on May 31, 1995.

When the court-martial reconvened on August 8, 1995, defense counsel filed a motion for expert assistance requesting "independent (i.e., unaffiliated with the Naval Drug Screening Laboratory, Jacksonville) expert assistance." She asserted that the independent expert assistance was needed for the following purposes: "(a) to assist defense in

understanding the scientific evidence (b) identifying problems with the scientific evidence and (c) preparing effective cross-examination of the government witness regarding the scientific evidence."

In support of her expanded request, defense counsel stated the following:

> The defense counsel in this case has no background in chemistry beyond basic high-school chemistry. Moreover, defense counsel does not have the knowledge of the drug-testing system used at NDSL Jax which would enable her to effectively cross-examine an expert in that area. The Standard Operating Procedure manuals are so voluminous and technical that defense counsel is unable to develop the required expertise independently.
>
> The Government will be assisted in interpretation and presentation of its evidence by the expert scientific knowledge, opinions, and testimony of Mr. Cary Hall, an expert from NDSL Jax. The Executive Officer of NDSL Jax has already stated that the command has a policy to "not allow" their personnel to "testify against each other" in courts-martial.

During argument on defense counsel's expanded request, trial counsel conceded that appellant was entitled to expert assistance, but would not concede that he was entitled to an independent expert, unaffiliated with the Navy Drug Screening Laboratory. Trial counsel asserted that adequate assistance was available from Mr. Cary Hall, "an

independent and objective expert." When defense counsel disputed trial counsel's assertion that Mr. Hall was "impartial," the military judge asked her, "Did you have an opportunity to talk with Mr. Hall yourself?" She responded, "Sir, I have not talked to him, nor do I intend to."

Before ruling on the defense request for assistance, the military judge offered the following advice:

> First let me say that one of the things that I certainly would encourage the defense counsel to do in this case, or any case, when it deals with a certain area of specificity or expertise, would be to call other defense counsel who have had experience in handling cases involving the drug labs and urinalyses in the past because they can provide assistance to you in how to go about litigating these cases, and there are a number of people on active duty in the naval service that are available to assist you in preparing a defense for this kind of case.

The military judge found that Mr. Hall was available "to explain to defense counsel the meaning of the scientific reports involved in this case, to interpret and explain the standard operating procedure manuals and regulations applicable to the drug lab and the Department of the Navy drug testing." He found further that "Mr. Hall is made equally available to both the Government and defense and will explain the urinalysis lab testing process fully and completely, without shading his testimony to favor either side in this case." Finally, he found that "Mr. Hall will readily fully explain the urinalysis testing procedures at the Navy Drug Screening Lab, Jacksonville, Florida, including any

difficulties, errors, or problems that the lab may have encountered generally or specifically with regard to the testing of the accused's sample."

The military judge then recited the defense burden of showing necessity and ruled that the defense had failed to meet that burden. Accordingly, he denied the motion for independent expert assistance.

The court-martial then recessed on August 8 and reconvened on August 15 for the trial on the merits. Mr. Hall testified for the prosecution regarding appellant's positive urinalysis. Defense counsel cross-examined Mr. Hall extensively about testing methods, control procedures, the likelihood of false positives, and the chain of custody. Defense counsel elicited admissions from Mr. Hall that some Navy laboratories, including the laboratory that tested appellant's sample, had experienced problems with testing accuracy. Defense counsel also elicited an admission that appellant's nanogram level was consistent with unknowing ingestion.

Appellant testified in his own defense and repeatedly denied knowingly using marijuana. He testified that he did not know why the marijuana metabolite was found in his urine. He testified that he was "very positive that [he] did not use, ingest, marijuana knowingly in any shape or form."

*Discussion*

RCM 703(d), Manual for Courts-Martial, United States (1998 ed.),2 authorizes the employment of experts at government expense when their testimony would be relevant and necessary, and when the Government cannot or will not provide an adequate substitute. An accused is not automatically entitled to an independent expert in every

urinalysis case. However, upon a proper showing of necessity, an accused is entitled to expert assistance to prepare a defense. *United States v. Burnette*, 29 MJ 473, 475 (CMA 1990). An accused is not, however, entitled to a specific expert of his own choosing. "All that is required is that competent assistance be made available." *Id.* As this Court observed in *United States v. Garries*, 22 MJ 288, 290-91 (1986), "In the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial." In *United States v. Gonzalez*, 39 MJ 459, 461 (1994), this Court adopted a three-pronged test for showing that expert assistance is necessary:

> First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.

In *United States v. Kelly*, 39 MJ 235, 238 (1994), this Court stated that "[d]efense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case," using "a number of primary and secondary materials" that are readily available. *See e.g.*, E. Imwinkelried, *The Methods of Attacking Scientific Evidence* (2d ed. 1992), cited in *Kelly*, *supra* at 238. Due process requires that the accused be given the "basic tools" necessary to present a defense, but defense counsel is responsible for doing his or her homework. *See Kelly, supra* at 237, citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

We review the military judge's decision on a request for expert assistance for abuse of discretion. *See United States v.*

*Washington*, 46 MJ 477, 480 (1997), citing *Garries*, *supra* at 291.

Applying the foregoing principles, we hold that the military judge did not abuse his discretion by denying the request for independent expert assistance. The defense offered nothing to show that appellant's case was not "the usual case." *See Garries*, *supra* at 290-91.

With respect to her original request for expert assistance to establish passive inhalation or innocent ingestion, defense counsel failed to show necessity. Although she refused to talk to Mr. Hall and insisted that he could not support the defense theory of innocent ingestion, the record reflects the contrary. Defense counsel made her point in cross-examination of Mr. Hall, when he agreed that appellant's urinalysis results were consistent with passive inhalation or innocent ingestion.

With respect to defense counsel's attempt to expand her request, we hold that the military judge did not abuse his discretion. He recognized defense counsel's attempt for what it was: an assertion that she did not know how to try a urinalysis case. He responded appropriately by suggesting that defense counsel consult with more experienced counsel and talk to Mr. Hall about the scientific procedures involved in this case. Defense counsel responded that she would not talk to Mr. Hall, even though basic trial preparation would require that he be interviewed, because he was expected to testify on the merits.

The record of trial does not reflect whether defense counsel heeded the military judge's advice. In fact, nowhere in the record did defense counsel describe what attempts she made to educate herself, before or after the military judge's gratuitous advice.

While Mr. Hall could not satisfy defense counsel's request for an independent expert, the military judge gave defense counsel "the tools potentially to gather evidence to lay a foundation for the necessity of an independent [assistant]." *Gonzalez*, 39 MJ at 461, citing *United States v. Kelly*, *supra*. After having a week to heed the military judge's advice, defense counsel did not renew her request for expert assistance when the court-martial convened for the trial on the merits.

Even with the benefit of post-trial hindsight, appellant still did not satisfy the *Gonzalez* test. The record reflects that defense counsel cross-examined Mr. Hall exhaustively, elicited potentially damaging admissions about problems with testing accuracy in his laboratory, and elicited scientific support for the defense theory of innocent ingestion.

In sum, there is nothing in this record to show necessity for an independent expert and nothing to show that the trial was rendered unfair by the military judge's refusal to order that an independent expert be provided. Accordingly, we hold that the military judge did not abuse his discretion.

*Decision*

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

*FOOTNOTES*:

1 Uniform Code of Military Justice, 10 USC § 839(a).

2 This Manual provision is the same as the provision that was in effect at the time of appellant's offense and court-martial.

SULLIVAN, Judge (dissenting):

It is a fundamental right that the defense should be able to have expert help if it is *necessary*. *See, e.g.*, Art. 46, Uniform Code of Military Justice, 10 USC § 846. The majority has confused the defense's burden of showing that expert assistance is needed with the right to have an unconflicted expert once it is conceded that an expert is needed. Disregarding the *trial counsel's concession that expert assistance was necessary* in this case, and the fact that the judge implicitly ruled that expert assistance was necessary by offering the defense an expert to assist in its case, the majority relitigates the necessity question in place of an appropriate adequacy inquiry. Under the circumstances of this case, a judge cannot offer as the only expert to the defense a conflicted one, *i.e.*, the principal prosecution expert witness.

This Court granted review in this case on March 13, 1998. Appellant asked:

> WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S REQUEST FOR A GOVERNMENT URINALYSIS EXPERT TO ASSIST IN HIS DEFENSE.

I would hold that the military judge prejudicially erred when he only made available the prosecution's chief witness as an expert to assist the defense in this drug urinalysis case. *United States v. Burnette*, 29 MJ 473, 476 (CMA 1990); *United States v. Van Horn*, 26 MJ 434, 438 (CMA 1988). Fair is fair, and it is not fair for the judge to give as the defense's only option for expert help the service of the main

prosecution witness.1 Surely the judge must have realized the apparent conflict of interest of an expert who is given to help both sides of the same case. If there is a case that can be summed up by a phrase from the Bible, this is that case -- "No man can serve two masters."2 How could the judge give the defense an expert witness whose main job would be to defeat the opposing expert witness (himself)?

Let us look at how this situation developed for the judge to commit his error. On March 23, 1995, appellant provided a urine sample as part of a unit sweep ordered by the Commanding Officer, Naval Air Station Atlanta, Georgia. It tested positive for the metabolite of marijuana, tetrahydrocannabinol (THC), at 16 nanograms per milliliter, 1 nanogram over the Department of Defense cutoff for samples to be declared positive. Appellant was then charged with the wrongful use of marijuana in violation of Article 112a, UCMJ, 10 USC § 912a.

In a letter dated May 23, 1995, defense counsel requested that the convening authority produce Doctor William Manders as an expert witness in appellant's court-martial and to provide expert assistance to the defense on matters of innocent ingestion and passive inhalation. Trial counsel, in a letter to the convening authority on May 31, 1995, recommended denial of this witness and assistance request, in part on the basis that a "substitute expert" from the Naval Drug Screening Laboratory at Jacksonville, Florida, could be made available who could provide the same testimony and assistance as Doctor Manders. The parties to this trial later stipulated that Doctor Manders would testify that "both innocent ingestion and passive inhalation could lead to the positive test for THC, the metabolite found in marijuana, based on the levels found in the sample submitted by Petty Officer Short."

At an Article 39(a)3 session prior to trial, defense counsel again submitted a request for an expert assistant dated July 25, 1995. It stated, *inter alia*:

*I. NATURE OF THE MOTION*

> In order to properly prepare for trial and effectively represent Petty Officer Short, the defense respectfully requests *independent (i.e., unaffiliated with the Naval Drug Screening Laboratory, Jacksonville) expert assistance* for the following purposes: (a) to assist defense in understanding the scientific evidence (b) identifying problems with the scientific evidence and (c) preparing effective cross-examination of the Government witness regarding the scientific evidence.
>
> The accused respectfully moves the Court to enter an order directing the government to provide *an independent expert assistant* . . . .

* * *

*II. STATEMENT OF FACTS*

> On 23 March 1995, AMH2 Short provided a urine sample during a unit sweep of personnel stationed at Naval Air Station, Atlanta. The sample was processed at the Naval Drug Screening Lab, Jacksonville ["NDSL Jax"] between 29 March 95 and 4 April 95. The results of this analysis include complex graphs, charts, and scientific terminology.
>
> The defense counsel in this case has no background in chemistry beyond basic high-school chemistry.

> Moreover, defense counsel does not have the knowledge of the drug-testing system used at NDSL Jax which would enable her to effectively cross-examine an expert in that area. The Standard Operating Procedure manuals are so voluminous and technical that defense counsel is unable to develop the required expertise independently.
>
> *The Government will be assisted in interpretation and presentation of its evidence by the expert scientific knowledge, opinions, and testimony of Mr. Cary Hall, an expert from NDSL Jax.* The Executive Officer of NDSL Jax has already stated that the command has a policy to "not allow" their personnel to "testify against each other" in courts-martial.

(Emphasis added.)

Defense counsel later noted the purpose for her request for independent expert assistance, as follows:

> DC: As far as another step that the defense must go through is to show what the defense assistant is required for. We are requesting defense's expert assistance *to explain the documentation in the evidence packet, to point out what discrepancies to look for in this documentation, to help to compare the documentation as the process -- the testing was performed to the DoD SOP of how it is supposed to happen, to point out weaknesses in the Government's case and to help to prepare an effective cross-examination of the Government's witness.*

* * *

> Sir, the case law -- to address a couple of points from the Government, first of all, the case law clearly states that expertise, if necessary, is applicable in all cases of court. Now, do we want an expert to write out our cross-examination questions for us? No. *But do we know what type of questions to ask unless we have the type of knowledge to see the deficiencies in the Government's case, to see the weaknesses in the government witnesses' [sic] argument? This is not only with regard to this test in particular* but also with regard to the Government – his expert is going to be explaining why the problem in the Norfolk drug lab wasn't -- isn't applicable. How do we know the intricacies of all of these problems and all these discrepancies unless we have an expert?
>
> * * *
>
> MJ: Did you have an opportunity to talk with Mr. Hall yourself?
>
> DC: Sir, I have not talked to him, nor do I intend to. *The one -- another aspect of expert assistant [sic] is confidentiality, and Mr. Hall clearly cannot perform one of the functions of being an expert assistant for the defense of confidentiality. I don't know how he would compartmentalize his brain in that way so that he could perform that function*, and, similarly, there is nobody that I can talk to until I have confidentiality.

(Emphasis added.)

The military judge ultimately denied the defense request. He stated:

MJ: First let me say that one of the things that I certainly would encourage the defense counsel to do in this case, or any case, when it deals with a certain area of specificity or expertise, would be to call other defense counsel who have had experience in handling cases involving the drug labs and urinalyses in the past because they can provide assistance to you in how to go about litigating these cases, and there are a number of people on active duty in the naval service that are available to assist you in preparing a defense for this kind of case.

MJ: I further make the following essential findings:

That Mr. Cary Hall of the Navy Drug Screening Lab, Jacksonville, Florida, is a recognized expert in the field of urinalysis testing.

*That Mr. Hall will not be here to represent either party to this litigation, but to explain the procedures followed at the drug screening lab in Jacksonville and to analyze the evidence and interpret the test results.*

MJ: That Mr. Cary Hall of the Navy Drug Screening Lab, Jacksonville, Florida, is available to explain to defense counsel the meaning of the scientific reports involved in this case, to interpret and explain the standard operating procedure manuals and regulations applicable to the drug lab and Department of the Navy drug testing.

That Mr. Hall is available at no expense to the defense.

*That Mr. Hall is made equally available to both the*

*Government and defense and will explain the urinalysis lab testing process fully and completely, without shading his testimony to favor either side in this case.*

That Mr. Hall will readily fully explain the urinalysis testing procedures at the Navy Drug Screening Lab, Jacksonville, Florida, including any difficulties, errors, or problems that the lab may have encountered generally or specifically with regard to the testing of the accused's sample.

That the burden is on the accused to show the necessity for services of an expert assistant by showing the reasonable probability that the expert would be of assistance and that denial of expert assistance would result in a fundamentally unfair trial.

*That the accused has failed to meet this burden.*

*That the assistance of Mr. Cary Hall is sufficient in this case to ensure that the accused receives due process and a fair trial.*

*That the assistance of Mr. Cary Hall is sufficient to ensure that the accused can present an adequate defense.*

MJ: And the motion is denied.

(Emphasis added.)

At the outset, I note that the scope of our appellate review in this case is substantially limited by trial counsel's concession that appellant was entitled to government-funded expert

assistance in this urinalysis prosecution.4 *See generally* 4 C.J.S. Appeal and Error § 185 at 255 (1993) ("A party who voluntarily . . . takes a position which is inconsistent with the right to appeal therefrom, thereby impliedly waives . . . his right to have such judgement . . . reviewed by an appellate court."). Normally, I would review the trial judge's decision denying such assistance in light of the three-prong test of *United States v. Gonzalez*, 39 MJ 459 (CMA 1994). Under *Gonzalez*, it is the defense's burden to show why expert assistance is needed; what it would accomplish for the accused; and why defense counsel is unable to gather such evidence himself. *Id.* at 461; *see United States v. Kelly* 39 MJ 235, 238 (CMA 1994). Here, however, trial counsel's concessionary tactics made it unnecessary for the defense to fully develop the record on these factual matters. *See generally* S. Childress and M. Davis, 1 *Federal Standards of Review* § 6.03 at 6-28 to 6-29 (2d ed. 1992). Thus, I need only decide whether the expert assistance actually proffered to the defense was sufficient to satisfy the Government's duty to provide "competent" expert assistance. *Id.*; see *United States v. Ndanyi*, 45 MJ 315, 319-20 (1996); *Burnette*, 29 MJ at 475.

I further note that the defense rejected assistance in this case only from a particular government expert, offered by trial counsel and approved by the military judge, not from all government experts. Cf. *Burnette*, *supra* at 476 ("Not only had the defense limited its request to the named civilian experts; it also had specifically rejected the assistance of *any* Government experts."). Here, defense counsel noted in her initial proffer that

> [t]he Government will be assisted in interpretation and presentation of its evidence by the expert scientific

> knowledge, opinions, and testimony of Mr. Cary Hall, an expert from NDSL Jax. The Executive Officer of NDSL Jax has already stated that the command has a policy to "not allow" their personnel to "testify against each other" in courts-martial.

She further stated, "If an independent expert from another drug lab is appointed, the prejudice to the accused, although not eliminated, would be greatly reduced." Thus, the precise question before us is whether the particular government expert proffered as an assistant to the defense, *i.e.*, the prosecution's chief witness, constituted "competent" expert assistance as required by *Burnette* and *Ndanyi*.

As noted above, the type of expert assistance proffered by the Government and approved by the military judge must be "competent" to assist an accused in preparing his defense. As we recently said in *Ndanyi*, the Government, "in the usual case," may satisfy this responsibility by providing "the investigative, medical, and other expert services available in the military." 45 MJ at 319 (quoting then—Judge Cox's opinion in *United States v. Garries*, 22 MJ 288, 290-91 (CMA 1986)). However, we also have said that such assistance is not sufficient where there is a showing by the accused at trial that his case is "unusual, *i.e.*, the proffered scientific experts at the . . . laboratory were unqualified, incompetent, *partial*, or unavailable." *Id.* at 320 (emphasis added).

In *Burnette*, then—Judge Cox, speaking for the Court, more particularly addressed this substitution problem in the context of drug experts in urinalysis cases. He said:

> It is well established that, upon a proper showing of necessity, an accused is entitled to the assistance of an

> expert to aid in the preparation of his defense. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *United States v. Garries*, 22 MJ 288 (CMA), *cert. denied*, 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed.2d 578 (1986). *See United States v. Johnson*, 22 USCMA 424, 47 CMR 402 (1973). This does not mean, however, that an accused is entitled to an expert of his own choosing. All that is required is that competent assistance be made available. *Ake v. Oklahoma*, *supra* at 83, 105 S.Ct. at 1097; *United States v. Toledo*, 25 MJ 270, 276 (CMA 1987).
>
> As to the instant case, we agree that very little, if any, showing of necessity was required to entitle the defense to expert assistance in the interpretation of drug analyses. *See United States v. Murphy*, 23 MJ 310 (CMA 1987). *Independent assistance – if desired – should have been provided.*

29 MJ at 475 (footnote omitted) (emphasis added*); see also Van Horn*, 26 MJ at 439 (Everett, C.J., concurring) ("[I]t is only fair that servicemembers accused of using drugs be given meaningful access to experts who are willing to challenge testing procedures and results."); *United States v. Robinson*, 39 MJ 88, 90 (CMA 1994) (Cox, J., dissenting) (condemning strict application of "golden rule" in urinalysis cases.)

In this light, I note that it was well known to the military judge that Mr. Cary Hall was expected to be the chief witness for the prosecution at this court-martial and was treated as such throughout this trial. It was also established that he was employed by the very laboratory which tested appellant's urine and reported it positive. Finally, he was the supervising officer for the laboratory testing process during the period

appellant's urine was tested and was responsible for the reports on drugs generated by the laboratory for purposes of litigation. Thus, the defense, who repeatedly requested any independent expert (*cf. Ndanyi, supra* at 319), was ultimately provided one who was obviously conflicted. *See Burnette, supra* at 476 (unfair "to expect the defense to extract its ammunition from one of the very witnesses whose conclusions it was attacking"); *Van Horn, supra* at 437-38 (independent expert required over expert with connection to the challenged laboratory). This was legal error. *Id.; see United States v. Crews*, 781 F.2d 826, 834 (10th Cir. 1986); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985).

Of course, even an erroneous denial of a defendant's request for expert assistance does not *per se* require reversal of his conviction. *See generally Moore v. Reynolds*, 153 F.3d 1086, 1112 (10th Cir. 1998)(undeveloped assertions that denied expert assistance would be beneficial do not show sufficient prejudice). Here, however, as noted above, the prosecution's case against appellant rested entirely on urinalysis evidence. *See generally United States v. Manuel*, 43 MJ 282, 287 (CMA 1995); *United States v. Murphy*, 23 MJ 310 (CMA 1987) (drug convictions based exclusively on urinalysis evidence require careful scrutiny by factfinders and appellate courts). In addition, this urinalysis evidence was marginal in the sense that it exceeded the Department of Defense cutoff by a single nanogram/milliliter and was only "within 10 percent of the cutoff" for its confirmation test. *See Van Horn, supra* at 237-38 (nanogram count and cutoff evidence goes to weight and reliability of prosecution's case); *see also United States v. Mack*, 33 MJ 251 (CMA 1991).

Finally, the record before us shows "[trial] defense counsel did not make a single inquiry into the specific technical data or documentation underlying appellant's positive urinalysis."

Final Brief at 14; *cf. United States v. Carlos*, 906 F.Supp. 582, 591 (D. Kan. 1995)(examination of record shows no cross-examination deficiency). In these circumstances, the possibility of prejudice resulting from the military judge's failure to provide independent expert assistance to the defense is too great to permit affirmance of this conviction. *See United States v. Crews, supra; United States v. Sloan, supra.*

My Brother, Judge Effron, has very similar views on this case, and I join him and his well articulated dissent.

*FOOTNOTES:*

1 I find that the judge erred here in the narrow circumstances of this close case. I do not hold that a government laboratory could never furnish expert help to both sides in a contested case. That question is an open one for this Court.

2 The Bible, Matthew (6:24).

3 Uniform Code of Military Justice, 10 USC § 839(a).

4 Trial counsel said, "[T]he Government does not contest in any way shape or form that the accused is entitled to expert assistance. In fact, that expert assistance [Mr. Cary Hall] is available and has been since the beginning of this case."

EFFRON, Judge, with whom SULLIVAN, Judge, joins (dissenting):

In order to obtain any expert assistance at government expense, the defense must show the necessity for it. *United States v. Gonzalez*, 39 MJ 459, 461 (CMA 1994); *see United States v. Burnette*, 29 MJ 473, 475 (1990); RCM 703(d), Manual for Courts-Martial, United States (1998 ed.). In this

case, the prosecution affirmatively conceded this point when trial counsel stated that "the Government does not contest in any way, shape, or form that the accused is entitled to expert assistance." Unless the military judge expressly rejects such a concession, which the judge here did not do, it must be accepted by this Court for the same reason that any trial waiver is accepted on appeal -- the concession relieved the defense from any burden. *See generally* S. Childress and M. Davis, 1 *Federal Standards of Review* § 6.03 at 6-28 to 6-29 (2d ed. 1992).

In order to satisfy the defense need for expert assistance, the Government offered Dr. Cary Hall. Dr. Hall was the same person who had provided expert assistance to the prosecution and who was to be the Government's chief witness against appellant.

In that context, Dr. Hall clearly was conflicted in providing the defense with expertise with which to contest the charge at issue. *See United States v. Ndanyi*, 45 MJ 315, 319 (1996); *United States v. Van Horn*, 26 MJ 434, 437-38 (CMA 1988).

It is also noteworthy that Dr. Hall was the supervising officer for the testing process at the Naval Drug Screening Laboratory, Jacksonville, Florida, which was the laboratory that had performed the testing on appellant's sample. Moreover, he was responsible for the reports on drugs generated by that laboratory for purposes of litigation. Defense counsel's contention -- "It is unlikely that an employee of the drug lab is going to point out deficiencies or problems in the procedures used" -- is underscored by the laboratory policy to not allow their personnel to testify against each other in a court-martial.

In light of the Government's express concession of the need for defense expert assistance, the conflict flowing from Dr. Hall's status as the principal prosecution witness against appellant, and the laboratory's own policy precluding its personnel from testifying against each other, I disagree with the majority's conclusion that the defense failed "to show necessity for an independent expert," ___ MJ at (9). The military judge abused his discretion when he denied the requested assistance, and, for the reasons discussed by Judge Sullivan, appellant was prejudiced by this error.

**APPENDIX B**

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

WILLIAM J. LUCAS K.T. SEFTON
LARRY D. WYNNE

UNITED STATES

v.

Darrin L. SHORT, 309-68-9909
Aviation Structural Mechanic (Hydraulics)
Second Class (E-5), U.S. Naval Reserve

NMCM 95 01617 Decided 10 November 1997

Sentence adjudged 17 August 1995. Military Judge: B.Q. Clemmons. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Air Station Atlanta, Marietta, GA.

*LT SYED N. AHMAD*, JAGC, USN, Appellate Defense Counsel

*LT BENNETT J. LEE*, JAGC, USNR, Appellate Government Counsel
*Maj CLARK R. FLEMING*, USMC, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignments of error,[1] and the Government's response. We also heard

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[1] I. THE TRIAL JUDGE ERRED WHEN HE DENIED APPELLANT'S REQUEST FOR EXPERT ASSISTANCE.

II. THE TRIAL COUNSEL COMMITTED REVERSIBLE PLAIN ERROR DURING ARGUMENT WHEN HE IN ESSENCE ARGUED FOR A DISCHARGE BASED ON THE NAVY'S POLICY TOWARD DRUG USE.

III. THE CONVENING AUTHORITY ERRED WHEN HE APPROVED THE DISCHARGE, BECAUSE PAGE 167 OF THE RECORD IS MISSING AND AS A RESULT THE RECORD IS NOT VERBATIM. (Citations omitted).

IV. THE JUDGE ERRED WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS THE URINALYSIS RESULTS - APPELLANT'S URINE SAMPLE WAS ILLEGALLY SEIZED BECAUSE IT WAS NOT OBTAINED PURSUANT TO AN INSPECTION WITHIN THE MEANING OF MILITARY RULE OF EVIDENCE 313. (Footnote and citation omitted).

V. THIS COURT IS WITHOUT JURISDICTION TO REVIEW THIS CASE BECAUSE ITS JUDGES, WHEN ACTING IN THEIR JUDICIAL CAPACITY, ARE PRINCIPAL OFFICERS, WHO HAVE NOT BEEN APPOINTED TO THEIR POSITIONS IN ACCORDANCE WITH THE APPOINTMENTS CLAUSE. (Citations omitted.)

VI. APPELLANT'S COURT-MARTIAL LACKS JURISDICTION BECAUSE THE MILITARY TRIAL JUDGE, ACTING IN HIS JUDICIAL CAPACITY, WAS A PRINCIPAL OFFICER WHO HAD NOT BEEN APPOINTED IN ACCORDANCE

oral argument by both Government and appellant's counsel. The findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Our reasoning is set out below.

During the appellant's trial we determined that the appellant "has not sustained his burden for expert assistance under *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994) and *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986)." Order denying Petition for Extraordinary Relief in the nature of a Writ of Prohibition and Mandamus, 15 August 1995. Despite our previous decision, the appellant asserts that we should give him a new trial because the military judge denied his request for expert assistance in the preparation of his defense.

The appellant's trial defense counsel requested "independent . . . expert assistance" before she interviewed the Government's expert. Appellate Exhibit IV; Record at 24. After interviewing and cross-examining the Government's expert, "it was incumbent on the defense to renew its request for independent expert assistance – if it was still deemed necessary." *United States v. Burnette*, 29 M.J. 473, 476 (C.M.A. 1990). *See also United States v. Ruth*, 46 M.J. 1, 4-5 (1997).

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WITH THE APPOINTMENTS CLAUSE. (Citations omitted.)

VII. APPELLANT'S COURT-MARTIAL LACKS JURISDICTION BECAUSE THE CONVENING AUTHORITY, IN HIS CAPACITY AS A CONVENING AUTHORITY, WAS A PRINCIPLE OFFICER, WHO HAD NOT BEEN APPOINTED IN ACCORDANCE WITH THE APPOINTMENTS CLAUSE. (Citations omitted.)

The appellant's trial defense counsel did not renew her request for independent expert assistance, and the appellant does not allege that the Government failed to disclose favorable evidence. *See United States v. Sebring*, 44 M.J. 805 (N.M.Ct.Crim.App. 1996). Instead, the record shows that the trial defense counsel effectively and extensively cross-examined the Government's expert. Record at 271-301; Defense Exhibits B-F. The appellant's trial defense counsel demonstrated "competence in defending [the] issue presented in [this] particular case." *United States v. Kelly*, 39 M.J. 235, 238 (C.M.A. 1994). The appellant's trial was fundamentally fair. Assignment of Error I provides no basis in law or fact for reexamining our previous decision.

The appellant's argument, in Assignment of Error II, that the trial counsel committed "reversible plain error during argument . . . based on the Navy's policy toward drug use" is without foundation in law or fact. *United States v. Kropf*, 39 M.J. 107, 109 (C.M.A. 1994).

The Government has corrected the administrative error in the record of trial identified in Assignment of Error III. Order granting Government Motion to Attach Documents, 19 Feb 1997. Page 167 was inadvertently omitted from the original record of trial. The missing page contained only a portion of the trial counsel's opening statement. We perceive no prejudice to the appellant, and none is alleged. Accordingly, we grant no relief. Art. 59(a), Uniform Code of Military Justice, 10 U.S.C. § 859(a) (1994).

With regard to Assignment of Error IV, we cannot improve on the analysis provided to us in the Government's reply: "The military judge properly denied appellant's motion to suppress the urinalysis results because appellant's

sample was given pursuant to a 'command sweep[]' . . . . R[ecord at] 72-73, 79-80[;] . . . . *United States v. Turner*, 33 M.J. 40 (C.M.A. 1991) . . . ."

Assignments of Error V-VII constitute a systemic attack on court-martial jurisdiction which has no merit. *See United States v. Grindstaff*, 45 M.J. 634, 635-36 (N.M.Ct.Crim.App. 1997).

Accordingly, the findings and sentence, as approved on review below, are affirmed.

Supreme Court, U.S.
FILED
NOV 18 1999

(2)

No. 99-362

# In the Supreme Court of the United States

DARRIN L. SHORT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner showed necessity for a requested independent expert in his court-martial.

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# In the Supreme Court of the United States

No. 99-362

DARRIN L. SHORT, PETITIONER

*v.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (Pet. App. 1a-23a) is reported at 50 M.J. 370. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 24a-28a) is unreported.

### JURISDICTION

The Court of Appeals for the Armed Forces entered its judgment on May 26, 1999. The petition for a writ of certiorari was filed on August 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

### STATEMENT

Petitioner was convicted by a general court-martial, composed of officer members, of wrongful use of a controlled substance, in violation of Article 112a of the Uniform Code of Military Justice, 10 U.S.C. 912a. He

was sentenced to a bad-conduct discharge and reduction to the lowest enlisted pay grade. Pet. App. 2a.

1. On March 23, 1995, petitioner provided a urine sample pursuant to a urinalysis inspection ordered by his commanding officer. Petitioner's sample contained 16 nanograms per milliliter of the metabolite of marijuana, one nanogram over the Department of Defense threshold for positive results. Pet. App. 2a.

Petitioner was charged under the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*, with the wrongful use of marijuana. Before trial, petitioner moved for the appointment, at government expense, of a specific forensic toxicologist to assist in the preparation of his defenses asserting passive inhalation and innocent ingestion. Pet. App. 2a. The government opposed the request on the ground that a suitable substitute was available at the Naval Drug Screening Laboratory, Jacksonville, Florida. *Ibid.* Before the convening authority ruled on petitioner's request, the court-martial began, and petitioner reiterated his request, expanding the scope of the request for assistance to include: interpreting the scientific testing performed in his case; understanding the documentation in the evidence packet; recognizing discrepancies in the documentation; comparing the documented testing process with the Department of Defense standard operating procedures; pointing out weaknesses in the government's case; and preparing an effective cross-examination of the government's witness. *Id.* at 3a-4a.

The government conceded before the military judge that petitioner was entitled to expert assistance, but disputed whether petitioner "was entitled to an independent expert, unaffiliated with the Navy Drug Screening Laboratory." Pet. App. 4a. The government instead maintained that petitioner could obtain assis-

tance from Mr. Cary Hall of the Navy Drug Screening Laboratory. Petitioner's counsel questioned the impartiality of Mr. Hall and, when asked by the military judge whether she had had an opportunity to talk to Mr. Hall, said: "Sir, I have not talked to him, nor do I intend to." *Id.* at 5a. The military judge suggested that petitioner's counsel also consult with other defense counsel with expertise in cases involving urinalysis reports. *Ibid.* The judge then found that Mr. Hall was available "to explain to defense counsel the meaning of the scientific reports involved in this case, to interpret and explain the standard operating procedure manuals and regulations applicable to the drug lab and the Department of the Navy drug testing." *Ibid.* He also determined that "Mr. Hall is made equally available to both the Government and defense and will explain the urinalysis lab testing process fully and completely, without shading his testimony to favor either side." *Ibid.* Finally, the military judge concluded that petitioner had the burden of showing the necessity of having the services of a different expert and that he had failed to meet that burden. *Id.* at 6a.

After petitioner's attempt to obtain a reversal of that decision in an interlocutory appeal was unsuccessful,[1]

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[1] Petitioner sought to take an interlocutory appeal from the denial under the All Writs Act, 28 U.S.C. 1651(a). Appellant Exh. XIX. The United States Navy-Marine Corps Court of Criminal Appeals found, as an interlocutory matter, that petitioner had failed to demonstrate necessity. Order Denying Petition for Extraordinary Relief in the Nature of a Writ of Prohibition and Mandamus, August 15, 1995. Although the court expressed reservation regarding whether the government's expert could act as an adequate substitute for an independent expert, it held that petitioner had not "sustained his burden for expert assistance" in the first place. *Ibid.*

the court-martial subsequently convened for trial on the merits, at which Mr. Hall testified for the prosecution regarding petitioner's positive urinalysis. Pet. App. 6a. "Defense counsel cross-examined Mr. Hall extensively about testing methods, control procedures, the likelihood of false positives, and the chain of custody. Defense counsel elicited admissions from Mr. Hall that some Navy laboratories, including the laboratory that tested [petitioner's] sample, had experienced problems with testing accuracy. Defense counsel also elicited an admission that [petitioner's] nanogram level was consistent with unknowing ingestion." *Ibid.*

2. The Navy-Marine Corps Court of Criminal Appeals affirmed. Pet. App. 24a-28a. The court noted that, in its earlier ruling on petitioner's interlocutory appeal, it had determined that petitioner "has not sustained his burden for expert assistance under *United States* v. *Robinson*, 39 M.J. 88 (C.M.A. 1994) and *United States* v. *Garries*, 22 M.J. 288 (C.M.A. 1986)[, cert. denied, 479 U.S. 985 (1986)]." Pet. App. 26a. The court further noted that, after petitioner's trial counsel had cross-examined the government's expert (Mr. Hall), "it was incumbent on the defense to renew its request for independent expert assistance if it was still deemed necessary." *Ibid.* The court concluded that the record established that petitioner's counsel had "effectively and extensively cross-examined the Government's expert" and that petitioner "does not allege that the Government failed to disclose favorable [information]." *Id.* at 27a. Finally, the court determined that petitioner's trial was "fundamentally fair." *Ibid.*

3. The Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-23a. Noting that petitioner had "offered nothing to show that [petitioner's] case was

not 'the usual case,'" the court explained that petitioner had failed to show necessity for the requested expert and that the military judge had not abused his discretion in denying petitioner's request. *Id.* at 8a. The court reasoned that the military judge had provided petitioner's trial counsel with helpful advice when he recommended that she interview Mr. Hall, something she had not done, and that she educate herself regarding the scientific procedures involved in the case. *Ibid.* The court stated that, even though "the military judge gave defense counsel the tools potentially to gather evidence to lay a foundation for the necessity of an independent assistant," it was unclear whether petitioner's counsel had availed herself of those tools, since the request for expert assistance was never renewed following the denial of the interlocutory appeal. *Id.* at 8a-9a. The court also noted that petitioner's counsel "elicited potentially damaging admissions about problems with testing accuracy in [Mr. Hall's] laboratory, and elicited scientific support for the defense theory of innocent ingestion." *Id.* at 9a.

Judge Sullivan dissented, concluding that government counsel had conceded petitioner's need for expert assistance and that the court should not have upheld the military judge's decision to "offer as the only expert to the defense a conflicted one, *i.e.*, the principal prosecution expert witness." Pet. App. 10a. Judge Effron filed a separate dissent expressing similar views. *Id.* at 21a-23a.

## ARGUMENT

Petitioner contends that his rights under the Due Process Clause and military rules of procedure were violated by the denial of his request for the assistance of an independent forensic toxicologist. Pet. 5. Both

military appellate courts correctly ruled that petitioner had failed to demonstrate necessity for the employment of his requested expert. Further review is not warranted.

1. This Court has never held that a defendant has a constitutional due process right to expert assistance beyond the circumstances described in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). In that case, a defendant charged with first-degree murder had been denied an expert psychiatrist to testify in mitigation of his punishment and he was sentenced to death. There the Court reasoned that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a factor at trial, the government is obliged by the Constitution to provide an indigent defendant with access to a psychiatrist's assistance. *Id.* at 83. The Court subsequently made clear that *Ake* should not be construed to compel the government to provide an indigent with the assistance of an expert outside the limited circumstances at issue in that case. See *Caldwell* v. *Mississippi*, 472 U.S. 320, 323 n.1 (1985) (stating that "[w]e therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought," *i.e.*, a criminal investigator, a fingerprint expert, and a ballistics expert). In both *Ake* and *Caldwell*, the Court emphasized that, at a minimum, a defendant must show necessity for the expert assistance. See *Caldwell*, 472 U.S. at 323 n.1 (a defendant must offer more than "undeveloped assertions that the requested assistance would be beneficial."); *Ake*, 470 U.S. at 78-83 (discussing the balance to be struck among private interests, governmental interests, and probative value of testimony sought and noting that, when mental condition is relevant to culpability,

psychiatric assistance may be "crucial to the defendant's ability to marshal his defense").

In applying this Court's decisions, the courts of appeals have required a defendant to show the necessity for expert assistance and that the lack of such assistance would result in a fundamentally unfair trial. See, *e.g.*, *Moore* v. *Kemp*, 809 F.2d 702, 712 (11th Cir. 1987) (en banc), cert. denied, 481 U.S. 1054 (1987); see also *Gray* v. *Thompson*, 58 F.3d 59, 66-67 (4th Cir. 1995), cert. granted in part *sub. nom. Gray* v. *Netherland*, 516 U.S. 1037 (1996), vacated and remanded on other grounds, 518 U.S. 152, 171, on remand, 99 F.3d 158 (4th Cir. 1996), cert. denied, 519 U.S. 1157 (1997); *Little* v. *Armontrout*, 835 F.2d 1240, 1244 (8th Cir. 1987), cert. denied, 487 U.S. 1210 (1988).

Petitioner's assertion of a conflict with other federal courts of appeals' decisions is incorrect. See Pet. 10-11. In *Smith* v. *McCormick*, 914 F.2d 1153 (9th Cir. 1990), the court held that a capital sentence for murder violated defendant's due process rights when the defendant was denied the right to psychiatric assistance. *Id.* at 1157. That case simply applied *Ake* in holding that a defendant had "the right to use the services of a psychiatrist in whatever capacity defense deems appropriate." *Ibid.* Similarly, in *United States* v. *Crews*, 781 F.2d 826 (10th Cir. 1986), the sanity of the defendant was at issue in the government's charge that the defendant had attempted to murder President Reagan. The court held that the defendant had the right to a psychiatrist who would assist the defendant in the presentation of his defense. *Id.* at 834. See also *United States* v. *Chavis*, 486 F.2d 1290 (D.C. Cir. 1973) (right to psychiatric assistance where competency to stand trial is at issue and sanity is defense). Like *Ake*, those cases do not stand for the more general proposition asserted

by petitioner of a right to government-funded expert assistance of the defendant's choice without a showing of necessity.

2. A military defendant's right to the employment of a requested expert is guaranteed by Rule for Courts-Martial (R.C.M.) 703, which requires the military trial judge to determine that the "testimony of the expert is relevant and necessary." R.C.M. 703(d).[2] Only when the military trial judge makes such a determination of relevance and necessity does the government have the obligation to offer to provide an "adequate substitute." *Ibid.*[3] The Court of Appeals for the Armed Forces has

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[2] Rule for Courts-Martial 703(d) provides:

(d) *Employment of expert witnesses.* When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

[3] The provision allowing for an adequate government substitute in place of a requested expert responds to differences between military and civilian criminal procedure. As recognized by the Court of Appeals for the Armed Forces, "[u]nlike the civilian defendant * * * the military accused has the resources of

interpreted the R.C.M. 703(d) necessity requirement as a three-part test that a military defendant must satisfy:

> First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.

Pet. App. 7a. While recognizing that defense counsel may be untrained in the subject-matter area in which expert assistance is sought, military courts have required that counsel educate themselves sufficiently to lay a foundation for a request for expert assistance. *Id.* at 7a, 9a; accord *Moore*, 809 F.2d at 712.

In this case, two tiers of military appellate courts reviewed petitioner's justification for expert assistance, and they correctly concluded that petitioner had failed to demonstrate necessity for the employment of the requested expert. Pet App. 2a, 8a-9a. Despite the judicial warnings before trial of both the military trial judge and the Navy-Marine Corps Court of Criminal Appeals that petitioner had failed to demonstrate necessity, he never attempted to articulate anything beyond "undeveloped assertions that the requested assistance would be beneficial." *Caldwell*, 472 U.S. at 323 n.1. The Court of Appeals for the Armed Forces noted that petitioner's counsel had "a week to heed the military judge's advice," but she still failed to renew

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the Government at his disposal. In the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial." *United States* v. *Garries*, 22 M.J. 288, 290-291 (C.M.A.) (internal citations omitted), cert. denied, 479 U.S. 985 (1986); see Pet. App. 8a (stating that petitioner "offered nothing to show that [his] case was not 'the usual case.'") (citation omitted).

her request when petitioner's trial on the merits began. Pet. App. 8a-9a. After holding that the military trial judge did not abuse his discretion in denying petitioner's requested expert, the court conducted its own "post-trial hindsight" assessment and determined that petitioner had not established necessity. *Id.* at 9a. Because petitioner did not establish his antecedent claim of necessity, his arguments that his rights were denied under the Constitution and the Rules for Courts-Martial are unpersuasive.

3. Petitioner claims (Pet. 12) that the government conceded that he was entitled to expert assistance, and that the military judge erred in finding that the government's expert was an adequate substitute. Those claims are misplaced. First, the record does not support petitioner's assertion of a concession by government counsel at the court-martial. At trial, the prosecution stated that "the government does not contest in any way[,] shape or form that the accused is entitled to expert assistance. * * * [I]n order for the defense to ask for an expert witness, * * * they must show necessity by showing reasonable probability that the expert would be of assistance, and that the denial of expert assistance would result in a fundamentally unfair trial." Trial Tr. 22. Even if those words could be construed as a concession, Rule for Courts-Martial 703(d) requires the military judge independently to "determine whether the testimony of the expert is relevant and necessary," and in this case ruled that "the accused has failed to meet [the] burden of" showing "the necessity for services of an expert assistant by showing the reasonable probability that the expert would be of assistance and that denial of expert assistance would result in a fundamentally unfair trial." Trial Tr. 25. That ruling was affirmed by the Navy-

Marine Corps Court of Criminal Appeals on interlocutory appeal. See Pet. App. 6a, 26a. Accordingly, before the trial on the merits began, any concession by the government had already been rejected by the military trial judge and the intermediate military appellate court.

Second, despite an invitation by the military judge, petitioner did nothing to supplement his already rejected claim of necessity. Pet. App. 5a. Thus, petitioner's failure to make the threshold showing of necessity renders irrelevant any analysis of the military trial judge's conclusion that the government's expert was an adequate substitute.[4]

Finally, both military appellate courts concluded that the record did not support a conclusion that petitioner's trial was unfair. Pet. App. 9a, 27a. The record reflected that trial defense counsel cross-examined the government expert exhaustively, eliciting "potentially damaging admissions about problems with testing accuracy," and a concession that petitioner's "urinalysis results were consistent with passive inhalation or innocent ingestion." *Id.* at 8a-9a. Petitioner has identified nothing that happened at trial that would support a finding of a violation of petitioner's rights under the Constitution or Rules for Courts-Martial. Petitioner's claim thus does not warrant further review.

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[4] The Court of Appeals for the Armed Forces did not rest its decision on the government's offer of its own witness as an adequate substitute for the requested expert, but on petitioner's failure to demonstrate necessity. Pet. App. 9a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-362

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1999

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DARRIN L. SHORT, *Petitioner*,

*v.*

UNITED STATES OF AMERICA, *Respondent*.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

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# REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT

Respondent's Brief in Opposition grossly misrepresents Petitioner's argument in claiming that Petitioner is asserting that he has a "right to government-funded expert assistance of [his own] choice without a showing of necessity." (Brief in Opposition at 7-8.) In making this inaccurate statement, Respondent mischaracterizes three aspects of Petitioner's position. First, Petitioner does not claim that he is entitled to a "funded" expert[1] in this case. Second, Petitioner does not

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[1] By a "funded" expert, Petitioner refers to a non-government expert who is compensated for his services with appropriated funds.

claim that he is entitled to an expert of his own choosing. Finally, Petitioner does not argue that the requirement for showing "necessity" in order to obtain defense expert assistance no longer exists or should be abandoned. Petitioner merely asserts that, under Article 46, Uniform Code of Military Justice, 10 U.S.C. § 846, when the prosecution is presenting an expert to testify against him regarding complex, scientific evidence[2] that will be material at trial, he is entitled to an independent expert who is unaffiliated with the prosecution to assist him in preparing and presenting his defense. (Pet. 1-5.)

1. With regard to the first two aspects of Respondent's claim, Petitioner ultimately neither requested any funding nor named a specific individual in his request for expert assistance. (R. at 21-24; App. Ex. IV.) Petitioner simply sought the assistance of a urinalysis expert who was **not testifying against him** on behalf of the prosecution for two reasons: 1) to assist him in effectively confronting, cross-examining, and impeaching the main prosecution witness, a drug urinalysis expert, and 2) for purposes of confidentiality. (R. at 22-24.) In fact, defense counsel agreed that an expert from another military drug-testing laboratory would suffice. (App. Ex. IV, sec. III, ¶ 4.) Citing to *United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A. 1986), Respondent acknowledges the difference between the military and civilian systems in requesting

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[2] Petitioner's urine sample allegedly contained 16 nanograms per milliliter of the purported marijuana metabolite. (Pet. App. 2a.) This amount is just one nanogram, or *one billionth of a gram*, per milliliter over the Department of Defense cut-off level for permitting criminal prosecution. This fact wholly supports Petitioner's need for urinalysis expert assistance in this case, as the validity, accuracy, and reliability of the urinalysis testing procedures was the most "significant factor" at Petitioner's trial.

expert assistance. (Br. Opp. n.3). *Garries* explained that since, unlike the civilian defendant, the military accused has the resources of the Government at his disposal, in the "usual case" the expert services available in the military are "sufficient to permit the defense to adequately prepare for trial." *Garries*, 22 M.J. at 290-91; Analysis of Rule for Courts-Martial [R.C.M.] 703(d), Manual for Courts-Martial, United States [M.C.M.] (1998 ed.), Appendix 21 at 21-35. Respondent, however, failed to acknowledge that *Garries* involved a request for funding a non-military private investigator, not a scientific expert already employed by the government. (Pet. n.14.)

Contrary to what Respondent would have this Court believe, Petitioner only asserts that, under the "equal opportunity" clause of Article 46, he was entitled to the "expert services available in the military" described in *Garries*. When the military judge denied Petitioner's motion for an independent government urinalysis expert to assist him in preparing and presenting his defense, Petitioner was denied equal access to the government resources guaranteed to him by Congress under Article 46, as interpreted in *Garries*. Since Petitioner did not insist on a funded, non-government expert, the Court of Appeals for the Armed Forces [hereinafter Court of Appeals] clearly erred when it concluded that Petitioner was not entitled to an independent expert because he "offered nothing to show that [his] case was not the 'the usual case.' " (Pet. App. 8a; Br. Opp. n.3.) Under Article 46 and *Garries*, Petitioner was not required to show that his case was "unusual" in order to obtain the non-funded expert assistance he sought, and the Court of Appeals erred in imposing this excessive burden on him.

2. Significantly, Respondent completely fails to

acknowledge Petitioner's right to "equal opportunity to obtain witnesses" under Article 46, the foundation for Petitioner's argument, anywhere in its brief. (Pet. 3, 5-9; Br. Opp.) Respondent instead attempts to misguide this Court into believing that Petitioner bases his argument on the Fifth Amendment underpinnings of *Ake v. Oklahoma*, 470 U.S. 68 (1985), and that he seeks to expand that holding. (Br. Opp. 6.) In reality, Petitioner only relies on the due process principles of *Ake* insofar as the Court of Appeals heretofore has incorporated them under the military due process provision of Article 46. (Pet. 6.) In his original petition, Petitioner cited not only to *Ake*, but also to other jurisdictions' application of *Ake*, for the proposition that a conflicted expert who is testifying against an accused on behalf of the prosecution cannot be considered "competent" assistance to the defense under either *Ake* or Article 46. (Pet. 10-11, n.8, n.9.) In replying to Respondent's Brief in Opposition, Petitioner simply asserts that a requirement of showing that the prosecution expert's testimony will constitute a "significant factor" in his trial represents the **maximum** standard to which a military defendant can be held in order to demonstrate his need for expert assistance under Congress's plain language in Article 46.

By failing to discuss Article 46 in its Brief in Opposition, Respondent elected to ignore the principal issue presented in this case. Instead, Respondent chose to argue that Petitioner failed to demonstrate "necessity" for the requested independent expert. Unfortunately, Respondent cannot ignore the absence of the "necessity" component in the plain language of Article 46 that it claims Petitioner failed to meet. Congress is not limited to the minimum requirements established by the Constitution in providing servicemembers stronger due process protections than those

found in the civilian sector. *United States v. Manuel*, 43 M.J. 282, 286 (1995); (Pet. n.4). In Article 46 Congress properly has exercised its power to increase the due process protections afforded servicemembers. U.S. Const. art. I, § 8, cl. 14. The President properly has mirrored this grant of increased protections in his promulgation of R.C.M. 703(a) and Military Rule of Evidence [M.R.E.] 706(a). Article 36, Uniform Code of Military Justice, 10 U.S.C. § 836; *see* footnote 4, *infra*. Therefore, Article 46 cannot be interpreted to impose any greater or more difficult burdens on military defendants than Congress and the President intended, or would be imposed on civilian indigent defendants seeking to obtain expert assistance. *See* Article 36, U.C.M.J.; (Pet. 2, n.2).

In this case, the only evidence presented by the prosecution was the results of a highly complex scientific test and the primary prosecution witness was a scientific expert who was required to present that evidence. *See United States v. Campbell*, 50 M.J. 154 (1999); *United States v. Murphy*, 23 M.J. 310, 312 (C.M.A. 1987). Clearly, under the plain language of Article 46 and the lesser constitutional protections provided under *Ake*, Appellant was entitled to an independent, conflict-free expert to assist him in the preparation of his defense. The military judge's failure to provide the defense with the requested independent expert denied Petitioner his right to "equal opportunity to obtain witnesses" under Article 46. As a result, Petitioner was denied his congressionally mandated right to military due process.

3. Concerning the final aspect of Respondent's claim, Petitioner actually asserts 1) that the "necessity" for a defense expert clearly was shown in this case, and 2) that the Court of Appeals again clearly erred in imposing an excessive and misplaced burden on Petitioner to establish

such a showing.[3] Respondent mistakenly defends both lower courts' conclusions that Petitioner failed to demonstrate "necessity" for obtaining independent expert assistance by espousing the three-part test set forth in *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994), to demonstrate the "necessity" component of R.C.M. 703(d). (Br. Opp. 8-9, n.2.) Under *Gonzalez*, a military accused must show why the expert is needed, what the expert would accomplish for the accused, and finally, why the defense counsel is unable to gather and present the evidence that the expert assistant would be able to develop. *Gonzalez*, 39 M.J. at 461. Respondent's focus on the Court of Appeals' application of this test to the case at bar is misplaced for the following reasons.

Like *Garries*, *Gonzalez* involved a request for an independent **investigator**, not a scientific expert to assist the defense in preparing to cross-examine a significant prosecution expert witness, as in the present case. *Id.* at 45-60. Unlike *Garries*, however, *Gonzalez* makes no reference to Article 46. The ruling in *Gonzalez* instead is based solely on the "necessity" requirement of R.C.M. 703(d), which governs requests for funding compensation of non-government expert witnesses.[4] Since the request in

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[3] Petitioner's reply to Respondent's claims on this issue do not alter his original assertions that the prosecution conceded that Petitioner was "entitled to expert assistance" at trial and, therefore, that the Court of Appeals erred in revisiting the "necessity" issue. (Pet. 13-14, n.15.) The military judge did not contest this concession on the record. Instead, the military judge applied a circular and illogical mode of reasoning by justifying his finding that Petitioner failed to demonstrate "necessity" with his finding that the prosecution expert witness was available to consult with defense counsel. (Pet. App. 15a-16a.)

[4] This proposition is clearly supported by the language of M.R.E. 706(a), regarding the "appointment and compensation" of court-

that case was for an investigator vice a scientific expert, and since the "equal opportunity" clause of Article 46 was not at issue, the question of whether requiring the defense to satisfy the test imposed in that case was proper is not germane to the case *sub judice*.[5] However, in a case such as Petitioner's, where a military accused requests independent non-funded government expert assistance because the prosecution is presenting an expert to testify about evidence which will be material at trial, the "equal opportunity" provision of Article 46 clearly controls.

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appointed experts, as well as the Drafters' Analysis of R.C.M. 703(d). In the first sentence of M.R.E. 706(a), the President repeats the "equal opportunity" language of Congress in Article 46 specifically with regard to **expert** witnesses. M.R.E. 706(a), M.C.M. (1998 ed.). The second sentence makes clear that "[t]he employment and compensation of expert witnesses is governed by R.C.M. 703." *Id.* Since the second sentence applies to "compensating" experts in cases where the government does not provide an "adequate substitute" under R.C.M. 703(d), the first sentence clearly applies to the "appointment" of government experts not requiring additional compensation. The President also repeats Congress's "equal opportunity" language in R.C.M. 703(a), and the Drafter's Analysis clearly states that the subsection is "based on Article 46." R.C.M. 703(a); Analysis, M.C.M. (1998 ed.), Appendix 21 at A21-35. Most importantly, however, the drafters further clarify that subsection (d) "does not apply to persons who are government employees or under contract to the Government to provide services which would otherwise fall within this subsection." *Id.* In these rules the President seems to clarify, as the Court of Appeals has been unable to do, that R.C.M. 703—with its "necessity" requirement—only applies in cases where the defense is seeking funding for the employment and compensation of a non-government expert.

[5] Petitioner questions the application of R.C.M. 703(d) in *Gonzalez*, however, since the defense request was for an independent military investigator, not a funded private investigator, and R.C.M. 703(d) clearly pertains to the employment of experts in situations where the government has not provided an "adequate substitute." (Br. Opp. n.2.)

Prior to Petitioner's case, the Court of Appeals' decisions regarding expert scientific witnesses consistently have interpreted Article 46, as well as R.C.M. 703(d), in accordance with the standards set forth in *Ake v. Oklahoma*. *See United States v. Van Horn*, 26 M.J. 434, 436-38 (C.M.A. 1988); *United States v. Burnette*, 29 M.J. 473, 475-76 (C.M.A. 1990); (Pet. 6-7). Since the due process concepts of *Ake* have been applied by military courts with regard to all experts in all cases, the standard for what constitutes "necessity" in *Ake*—that the subject matter of the prosecution expert's testimony will be a "significant factor at trial"—should be the most stringent standard a military accused should have to satisfy in order to obtain expert assistance under the military due process provision of Article 46. *See Manuel*, 43 M.J. at 286; *Garries*, 22 M.J. at 290; (Pet. 5-7, n.4). This argument is strongly supported by, and consistent with, the plain language of Article 46, which contains **no requirement for a showing of "necessity"** in cases where "equal opportunity to obtain witnesses" is at issue. (Pet. 3.) Thus, in a case where the prosecution is presenting expert testimony regarding evidence which is material—or a "significant factor"—at trial, the defense should have an "equal opportunity" to obtain an equally competent expert for assistance in confronting, cross-examining, and impeaching that witness.

In *Burnette*, the Court of Appeals for the Armed Forces seemed to correctly recognize this lesser standard in cases such as Petitioner's when it acknowledged that "very little, if any, showing of necessity [is] required to entitle the defense to expert assistance in the interpretation of drug analyses." *Burnette*, 29 M.J. at 475. *Burnette*, however, involved a request for funding a specified civilian expert at government expense, implicating the "necessity"

requirement under R.C.M. 703(d).[6] *Id.* at 474. Since Petitioner did not insist on a funded, non-government expert in his request, this case is governed by the congressional language of Article 46, not R.C.M. 703(d). *See* footnote 4, *supra*. Therefore, the only burden Petitioner assumed when requesting the independent expert to assist in his defense was demonstrating that the prosecution would be presenting expert testimony concerning a "significant" issue at his trial. Since the prosecution was required under *Murphy*, 23 M.J. 310, to present a urinalysis expert in order to prosecute Petitioner for wrongful drug use, and since the urinalysis test results constituted the prosecution's entire case against him,[7] Petitioner unquestionably satisfied his burden. (Pet. 8-9, 14-17.) By increasing the burden on Petitioner to exceed the *Ake* standard for showing "necessity" in the present case, the Court of Appeals impermissibly incorporated a requirement under Article 46 that was not authorized by Congress or the President. *See* footnote 4, *supra*.

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[6] The absence of reference to either the Fifth Amendment or *Ake* in the Drafter's Analysis of R.C.M. 703(d) indicates that the necessity requirement mentioned in that subsection is not based on either authority. M.C.M. (1998 ed.), Appendix 21 at A21-35.

[7] Petitioner reminds this Court that, under Articles 29 and 52, U.C.M.J., the prosecution may obtain a conviction for wrongful use of marijuana by as few as two out of three court-martial members. 10 U.S.C. §§ 829, 852. This fact further underscores the importance of independent expert assistance for the defense in drug use prosecutions based solely on urinalysis test results.

## Conclusion

For the foregoing reasons, and those set forth in the petition, the writ should be granted.

Respectfully submitted,

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